SSM Management Sdn Bhd v Aeon Big (M) Sdn Bhd (formerly known as Magnificient Diagraph Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1328–07 OF 2017
ROHANA YUSUF, VERNON ONG AND HARMINDAR SINGH JJCA
12 FEBRUARY 2019

Companies and Corporations — Winding up — Appeal against winding up — Winding up order — Whether appellant obligated to return deposit paid by respondent although court did not make order for same — Whether winding up petition could still stand despite fact that appellant had substantial cross-claim against respondent which exceeded amount of alleged debt — Whether appellant was solvent company — Companies Act 1965 s 218(1)(e) & (2)(a)

This was an appeal against the decision of the learned judge in allowing the winding up petition filed by the respondent under s 218(1)(e) and (2)(a) of the Companies Act 1965 ('the CA') and wound up the appellant company. Aggrieved with the decision, the appellant filed the instant appeal. In this instant appeal, both the appellant and the respondent had executed a lease agreement ('lease agreement') whereby the appellant agreed to lease a plot of land ('the said land') for a period of 30 years to the respondent. The lease agreement was subject to conditions precedent. A deposit amounting to RM1.1m was paid by the respondent to the appellant under the lease agreement to which pursuant to the same, the appellant was to refund the deposit to the respondent upon the determination of the lease agreement. The appellant then rescinded the lease agreement and prior to that, there was a disagreement as to the non-fulfillment of certain conditions precedent as stipulated in the lease agreement before the cut-off date. This resulted in the respondent to commence legal action at Kuala Lumpur High Court on 2014 against the appellant for specific performance. The respondent returned the appellant's cheque for the sum of RM1.1m to the appellant's solicitors and indicated that the deposit of RM1.1m was to be held by the appellant's solicitors as stakeholder pending the outcome of the 2014 civil suit. Nevertheless, the 2014 civil suit was dismissed by the KL High Court on 29 July 2016 with costs of RM20,000 to the appellant. The KL High Court essentially decided that the appellant had correctly exercised its right to terminate the lease agreement. Subsequent to the dismissal of the 2014 civil suit, the respondent demanded the refund of the deposit of RM1.1m from the appellant. Despite several letters of demand, the appellant ignored and/or refused to refund the said deposit. The respondent then commenced the instant winding up proceedings against the appellant based on the appellant's inability to pay its debt to the respondent. The proceedings were consequent to

A the issuance by the respondent of the statutory winding up notice under s 218 of the CA. At the High Court, the appellant raised several issues to resist the winding up petition. The first key issue was that the appellant was not liable to pay the alleged debt of RM1.1m as it was not so ordered in the 2014 civil suit. The second argument raised to defeat the petition was that the appellant had a B substantial cross-claim against the respondent in the form of a civil suit filed on 2 May 2017 ('2017 civil suit') which claim exceeded the amount of the alleged debt. As such, the alleged debt was being disputed on bona fide grounds. The third issue was the contention by the appellant that it was a solvent company as evidenced by the auditor's statement which must be accepted as rebutting the C presumption of insolvency. The learned judge, however, was not impressed by the argument raised in opposition to the petition and granted the winding up of the appellant.

D **Held**, dismissing the appeal with costs of RM10,000 and affirming the order of the High Court:

(1) What was compelling was that there was a clear and unequivocal admission of indebtedness by the various attempts by the appellant to effect repayment of the sum of RM1.1m being the deposit under the lease E agreement before decision was pronounced in the 2014 civil suit. Even when faced with this admission, the appellant did not deny its liability to make the refund of the RM1.1m. All the appellant did was to maintain its position that there was no order to refund in the 2014 civil suit. This position was rather disingenuous as by the terms of the lease agreement, F there was an obligation to refund the deposit in the event of termination. In the present case, the respondent was relying on the consequences attendant upon the decision in the 2014 civil suit and not the judgment itself. The obligation to refund the deposit of RM1.1m arose from the terms of the lease agreement pursuant to the judgment in the 2014 civil G suit that the lease agreement had been lawfully terminated (see paras 12–13 & 15).

(2) The learned judge was entitled to consider if the cross-claim was genuine and based on substantial grounds. The findings by the learned judge in H this context were clearly warranted (see para 18).

(3) It is settled law that once a company has failed to comply with the statutory demand, there is a presumption of insolvency against it. The onus then shifts to the company to show that it is able to pay all its debts I at the material time. The test of insolvency, as the learned Judge correctly noted, is the test of commercial insolvency or cash flow insolvency in that the company must be able to pay its debts when they fall due and not at some future date. In other words, the company must be willing and able to meet the current demand of the creditor. In this way, a company

cannot be said to be solvent when it asserts that it is able to pay the debt but persist in doings so (see para 20).

(4) Any attempt to displace the presumption of insolvency must go beyond the opinions of insolvency by auditors. Rather than mere assertions of insolvency even by professionals, a company must produce the best evidence of its financial position in the form of audited statements and accounts. The appellant, even if it was an exempt private company, had an obligation under the law to maintain audited accounts (see para 22).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim yang terpelajar dalam membenarkan petisyen penggulungan yang difailkan oleh responden di bawah s 218(1)(e) and (2)(a) Akta Syarikat 1965 ('Akta') dan menggulungkan syarikat perayu. Terkilan dengan keputusan, perayu memfailkan rayuan ini. Di dalam rayuan ini, kedua-dua perayu dan responden telah melaksanakan satu perjanjian pajakan ('perjanjian pajakan') di mana perayu bersetuju untuk melaksanakan satu plot tanah ('tanah tersebut') untuk tempoh 30 tahun kepada responden. Perjanjian pajakan tertakluk kepada prasyarat-prasyarat. Satu deposit berjumlah RM1.1 juta dibayar oleh responden kepada perayu di bawah perjanjian pajakan yang mana menurut yang sama, perayu sepatutnya membayar balik deposit kepada responden semasa perjanjian pajakan tamat. Perayu kemudian membatalkan perjanjian pajakan dan sebelum itu, terdapat ketidaksepakatan kepada prasyarat-prasyarat sepertimana yang di dalam perjanjian pajakan sebelum tarikh akhir. Ini menyebabkan responden memulakan tindakan undang-undang di Mahkamah Tinggi Kuala Lumpur pada 2014 terhadap perayu untuk perlaksanaan khusus. Responden memulangkan cek perayu untuk jumlah RM1.1 juta kepada peguamcara perayu dan menunjukkan bahawa deposit berjumlah RM1.1 juta untuk disimpan oleh peguamcara perayu sebagai pemegang kepentingan sementara menunggu hasil saman sivil 2014. Walau bagaimanapun, saman sivil 2014 tidak dibenarkan oleh Mahkamah Tinggi KL pada 29 Julai 2016 dengan kos sebanyak RM20,000 kepada perayu. Mahkamah Tinggi KL pada dasarnya memutuskan bahawa perayu telah dengan betul menggunapakai haknya untuk menamatkan perjanjian pajakan. Selepas saman sivil 2014 tidak dibenarkan, responden meminta pemulangan balik deposit sebanyak RM1.1 juta kepada perayu. Walaupun menerima beberapa surat tuntutan, perayu tidak mengambil endah dan/atau menolak untuk memulangkan deposit tersebut. Responden kemudiannya memulakan prosiding penggulungan di sini terhadap perayu berdasarkan ketidakbolehan perayu untuk membayar hutangnya kepada responden. Prosiding tersebut ekoran daripada notis statutori penggulungan yang dikeluarkan oleh responden di bawah s 218 Akta tersebut. Di Mahkamah Tinggi, perayu membangkitkan beberapa isu untuk menolak petisyen penggulungan. Isu utama pertama adalah perayu tidak bertanggungjawab untuk membayar hutang yang dikatakan berjumlah

A RM1.1 juta memandangkan ia tidak diarahkan di dalam saman sivil 2014. Hujahan kedua dibangkitkan untuk mengalahkan petisyen adalah bahawa pempetisyen ada tuntutan silang yang penting terhadap responden dalam bentuk saman sivil yang difailkan pada 2 Mei 2017 ('saman sivil 2017') yang mana tuntutannya melebihi jumlah hutang yang dikatakan. Oleh itu, hutang B yang dikatakan dipertikaikan atas dasar-dasar dengan suci hati. Isu ketiga adalah dakwaan bahawa perayu adalah syarikat yang solven seperti keterangan oleh penyataan juruaudit yang mana harus diterima sebagai menentang anggapan tidak mampu bayar. Hakim yang terpelajar, walau bagaimanapun, tidak kagum dengan hujahan yang dibangkitkan oleh pihak lawan kepada C petisyen dan membenarkan penggulungan perayu.

Diputuskan, rayuan ditolak dengan kos sebanyak RM10,000 dan perintah Mahkamah Tinggi disahkan:

D (1) Apa yang menarik perhatian ia adalah jelas dan tidak dapat disangkal pengakuan hutang dengan perlangaran percubaan oleh perayu untuk membayar semula jumlah RM1.1 juta selaku deposit di bawah perjanjian pajakan sebelum keputusan diumumkan di dalam saman sivil 2014. Walaupun berhadapan dengan pengakuan, perayu tidak menafikan E liabiliti beliau untuk memulangkan balik RM1.1 juta. Apa yang perayu buat adalah untuk mengekalkan kedudukan bahawa tiada perintah untuk pemulangan balik di dalam saman sivil 2014. Kedudukan ini adalah tidak jujur memandangkan berdasarkan terma-terma perjanjian pajakan, terdapat obligasi untuk memulangkan semula deposit dalam F masa penamatan. Di dalam kes di sini, responden bergantung kepada akibat-akibat kedatangan semasa keputusan saman sivil 2014 dan bukanlah penghakiman sendiri. Kewajipan untuk memulangkan semula deposit RM1.1 juta bangkit daripada terma-terma perjanjian pajakan menurut penghakiman di dalam saman sivil 2014 bahawa perjanjian G pajakan telah ditamatkan secara sah dari segi undang-undang (lihat perenggan-perenggan 12–13 & 15).

(2) Hakim terpelajar layak untuk mempertimbangkan jikalau tuntutan silang adalah jujur dan berdasarkan dasar-dasar yang penting. H Penemuan-penemuan oleh hakim terpelajar di dalam konteks ini secara terangnya dibenarkan (lihat perenggan 18).

(3) Ia adalah undang-undang mantap bahawa apabila syarikat gagal memenuhi permintaan statutori, terdapat anggapan ketidakmampuan bayar ke atasnya. Beban kemudiannya bertukar kepada syarikat untuk I menunjukkan bahawa ia mampu untuk membayar semua hutang-hutang pada waktu yang material. Ujian ketidakmampuan bayar, seperti yang telah dinyatakan oleh hakim yang terpelajar, adalah ujian ketidakmampuan bayar komersial atau aliran tunai ketidakmampuan bayar syarikat di mana syarikat mestilah boleh membayar hutang-hutang

apabila ia terhutang dan tidak pada sesetengah tarikh di masa depan. Dalam erti kata lain, syarikat mestilah bersedia dan boleh memenuhi permintaan semasa peminjam. Dalam cara ini, syarikat tidak boleh dikatakan solven apabila ia menegaskan bahawa ia boleh membayar hutang tetapi berterusan dalam melakukan yang sama (lihat perenggan 20).

(4) Apa-apa percubaan untuk menggantikan anggapan ketidakmampuan bayar mestilah lebih daripada pendapat-pendapat ketidakmampuan bayar oleh juruaudit. Daripada sekadar pernyataan ketidakmampuan bayar oleh professional-profesional, syarikat mestilah mengeluarkan keterangan yang paling baik berkenaan dengan kedudukan kewangan dalam bentuk pernyataan yang diaudit dan akaun-akaun. Perayu, walaupun merupakan syarikat swasta yang dikecualikan, ada bertangungan di bawah undang-undang untuk mengekalkan akaun-akaun yang telah diaudit (lihat perenggan 22).]

Notes

For cases on appeal against winding up, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1346–1355.

Cases referred to

Ahmad Shahrir bin Nazi v Nashrul Hazimie bin Ab Halim & Ors [2016] 10 MLJ 15, HC (refd)

Hup Heng Poultry Industries Pte Ltd v Flavour Right Sdn Bhd [2015] MLJU 716, HC (refd)

Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (refd)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)

Legislation referred to

Companies Act 1965 ss 165A, 218, 218(1)(e), (2)(a)

Appeal from: Companies Winding Up No WA-28NCC-173–03 of 2017 (High Court, Kuala Lumpur)

Kelvin Seet Wan Nam (Dennis Yuean with him) (Cheang & Ariff) for the appellant.

R Jayasingam (BH Lawrence & Co) for the respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] This appeal arose from the order of the Kuala Lumpur High Court dated 23 June 2017. The learned judge had allowed the winding-up petition filed by

A the respondent under s 218(1)(e) and 218(2)(a) of the now repealed Companies Act 1965 ('the CA 1965') and wound up the appellant company.

[2] Aggrieved with the decision, the appellant filed the instant appeal. After hearing the parties and taking into consideration the written submissions, we
B unanimously dismissed the appeal and affirmed the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

C BACKGROUND FACTS

[3] The facts leading to the presentation of the winding-up petition are not disputed and have been summarised by the parties in their submissions and by the learned judge as follows. The appellant and the respondent executed a lease
D agreement dated 22 June 2012 ('the lease agreement') whereby the appellant agreed to lease a plot of land ('the said land') for a period of 30 years to the respondent. The lease agreement was subject to conditions precedent.

[4] A deposit amounting to RM1.1m was paid by the respondent to the
E appellant under the lease agreement. Pursuant to the lease agreement, the appellant was to refund the deposit to the respondent upon the determination of the lease agreement.

[5] On 23 September 2013, the appellant rescinded the lease agreement and
F attempted to refund the said deposit. Prior to that, there was a disagreement as to the non-fulfillment of certain conditions precedent as stipulated in the lease agreement before the cut-off date. This resulted in the respondent commencing legal action in Suit No 22NCVC-113–03 of 2014 in the KL High Court ('2014 civil suit') against the appellant for specific performance.

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[6] The respondent returned the appellant's cheque for the sum of RM1.1m to the appellant's solicitors and indicated that the deposit of RM1.1m was to be held by the appellant's solicitors as stakeholder pending the outcome of the 2014 civil suit. Nevertheless, the 2014 civil suit was dismissed by the KL High
H Court on 29 July 2016 with costs of RM20,000 to the appellant. The KL High Court essentially decided that the appellant had correctly exercised its right to terminate the lease agreement.

[7] Subsequent to the dismissal of the 2014 civil suit, the respondent
I demanded the refund of the deposit of RM1.1m from the appellant. Despite several letters of demand, the appellant ignored and/or refused to refund the said deposit of RM1.1m. The respondent then commended the instant winding up proceedings against the appellant based on the appellant's inability to pay its debt to the respondent. The proceedings were consequent to the

issuance by the respondent of the statutory winding up notice under s 218 of the CA 1965. A

AT THE HIGH COURT

[8] At the High Court, the appellant raised several issues to resist the winding-up petition. The first key issue was that the appellant was not liable to pay the alleged debt of RM1.1m as it was not so ordered in the 2014 civil suit. The second argument raised to defeat the petition was that the appellant had a substantial cross-claim against the respondent in the form of a civil suit filed on 2 May 2017 ('2017 civil suit') which claim exceeded the amount of the alleged debt. As such, the alleged debt was being disputed on bona fide grounds. The third issue was the contention by the appellant that it was a solvent company as evidenced by the auditor's statement which must be accepted as rebutting the presumption of insolvency. B C D

[9] The learned judge, however, was not impressed by the arguments raised in opposition to the petition and granted the winding-up of the appellant. The reasons for doing so are now being assailed by the appellant but for the moment, it will be useful and sufficient to summarise the key findings of the learned judge as follows: E

(a) the appellant's obligation to refund the deposit of RM1.1m flows from the terms of the lease agreement and the termination of the lease agreement which has since been judicially ruled to be lawful; F

(b) the 2017 civil suit filed by the appellant subsequent to the commencement of the winding up proceedings is not a genuine cross-claim and not one based on substantial grounds. The 2017 civil suit is an afterthought and devoid of real substance; and G

(c) although the appellant is an exempt private company, its burden of proving that it is solvent is not different from the company that has the statutory obligation to file its annual return. Section 165A of the Companies Act 1965 does not dispense with the requirement for an exempt private company from having to prepare its audited accounts. The appellant has not rebutted the presumption of insolvency. H

THE INSTANT APPEAL

[10] Before us, the appellant raised the same key arguments that were raised in the High Court and which were set out earlier. After due consideration, we did not think the learned judge was in error in his findings. We did not find any merit in the arguments raised before us. In relation to the issues and arguments raised, we considered and decided in the following fashion. I

A NO DEBT DUE AND PAYABLE

[11] The first complaint of the appellant was that there was no order in the 2014 civil suit to pay the alleged debt of RM1.1m. Citing the case of *Ahmad Shahrir bin Nazi v Nashrul Hazimie bin Ab Halim & Ors* [2016] 10 MLJ 15, the appellant argued that the respondent ought to have asked for a consequential order for the deposit to be refunded. Having failed to do so, the appellant contended that the respondent could not use the winding up petition as a machinery for trying a common law action. A civil claim ought to have been filed to claim for the refund as decided in *Hup Heng Poultry Industries Pte Ltd v Flavour Right Sdn Bhd* [2015] MLJU 716.

[12] With respect, we do not think there is any merit in the arguments raised as aforesaid. What is compelling is that there was a clear and unequivocal admission of indebtedness by the various attempts by the appellant to effect repayment of the sum of RM1.1m being the deposit under the lease agreement before decision was pronounced in the 2014 civil suit. This sum was however returned by the respondent pending the outcome of the 2014 civil suit for specific performance of the lease agreement.

[13] Even when faced with this admission, the appellant did not deny its liability to make the refund of the RM1.1m. All the appellant did was to maintain its position that there was no order to refund in the 2014 civil suit. This position was rather disingenuous as by the terms of the lease agreement, there was an obligation to refund the deposit in the event of termination. We agree with the learned judge that this obligation to pay flowed from the termination of the lease agreement, or in other words, was the legal consequence of the termination.

[14] It was also pointless to argue that there must be a judgment for the sum of RM1.1m before winding up proceedings can be commenced. It is trite law that a creditor is not required to obtain a judgment before issuing the statutory demand (see *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95; *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817). Of course, if there is a judgment, a debtor would be hard-pressed to argue that the debt in question is disputed. Conversely, a debtor would be better placed to argue a bona fide dispute exists when there is no judgment. Even then, the debtor must provide cogent reasons to show the existence of a bona fide dispute. The primary consideration is whether there is compelling evidence of an inability to pay a debt when it falls due whether under a judgment or otherwise.

[15] In the instant case, the respondent was relying on the consequences attendant upon the decision in the 2014 civil suit and not on the judgment

itself. We agree with the learned judge that the obligation to refund the deposit of RM1.1m arose from the terms of the lease agreement pursuant to the judgment in the 2014 civil suit that the lease agreement had been lawfully terminated. For these reasons, this argument by the appellant cannot succeed.

THE EXISTENCE OF A SUBSTANTIAL CROSS–CLAIM

[16] In this context, the appellant asserted that there existed a substantial cross-claim which far exceeded the sum of the alleged debt in the statutory notice. The background to the cross-claim was that the land in the lease agreement is owned by Nobletree Dynamics Sdn Bhd ('Nobletree'). Nobletree had executed a long term lease agreement with the appellant on 9 May 2011. There was also purportedly a supplemental long lease agreement dated 14 June 2011 in which it was alleged that a total sum of RM23,560,000 was paid by the appellant to Nobletree which sum was purportedly forfeited by Nobletree because of the respondent's wrongful entry of a private caveat on the said land. The appellant is now seeking to prove these assertions in KL Suit No WA-22NCVC-216–05 of 2017 filed on 2 May 2017 ('2017 civil suit').

[17] Now, the learned judge expressed grave doubt as to whether this cross-claim was genuine and of substance. On this score, we agree with the finding of the learned judge and the reasons provided. The learned judge in paras [35]–[40] found as follows:

> [35] There is no disputing this principle. But is the cross-claim genuine and of substance? It cannot be denied that the purported supplemental long lease agreement was never raised or mentioned by the respondent. In fact, the petitioner was first made aware of the allegations surrounding the forfeiture after the filing of the petition when it received the writ and statement of claim for the 2017 civil suit.
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> [36] Instead, the petitioner could furnish documentary evidence to demonstrate that the respondent had never once mentioned even a word in relation to the alleged existence of this purported supplemental long lease agreement. First, in the lease agreement between the petitioner and the respondent, only the main lease agreement dated 1 May 2011 between the respondent with Nobletree was disclosed and there is no mention of the purported supplemental long lease agreement at all.
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> [37] Secondly, neither was there any mention about the purported supplemental long lease agreement in the correspondences between the petitioner's solicitors and the respondent in respect of the lease agreement.
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> [38] Thirdly, since the commencement of the petitioner's 2014 civil suit on 13 March 2014 against the respondent, and until delivery of the court decision on 29 July 2016 after full trial, the respondent never raised or pleaded the existence of the supplemental long lease agreement.
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> [39] Fourthly, the respondent also did not reply to any of the several letters of demand sent by the petitioner's solicitors nor raise the existence of the supplemental

long lease agreement when the respondent's solicitors did eventually make a reply to the petitioner's 218 notice.

[40] In short, the respondent produced nothing apart from the writ and statement of claim which in any event were tellingly only filed subsequent to the commencement of the winding up proceedings by the petitioner. Not even the supplemental long lease agreement was exhibited. Not to mention the absence of any attempt to show relevant documentation such as resolutions authorising the execution of the same or that evidencing the purported payment of the RM23,560,000 to Nobletree.

[18] In the event, the learned judge found the cross-claim to be an 'afterthought and devoid of real substance'. In other words, it was not a genuine claim based on substantial grounds. The appellant now contends that the learned jsudge had failed to appreciate the appellant's claim in the 2017 civil suit and was not entitled to adjudicate upon a matter pending in the civil court. We do not agree. In our view, the learned judge was entitled to consider if the cross-claim was genuine and based on substantial grounds. As alluded to earlier, the findings by the learned judge in this context were clearly warranted. Again, we were not persuaded that this argument had any merit.

WHETHER THE APPELLANT IS A SOLVENT COMPANY

[19] In its final key argument, the appellant contended that it was indeed a solvent company and was able to pay its debt as and when it accrues. In this respect, the appellant relied upon two documents. The first was the auditors' statement dated 30 December 2016 ('auditors' statement') and the second was the certificate relating to an exempt private company also dated 30 December 2016 ('EPC Certificate'). In essence, these two documents provide that the appellant had kept proper accounting records and other books for the year 2016 and that the appellant appeared to have been able to meet its liabilities as and when they fall due.

[20] In this regard, it is settled law that once a company has failed to comply with the statutory demand, there is a presumption of insolvency against it. The onus then shifts to the company to show that it is able to pay all its debts at the material time. The test of insolvency, as the learned judge correctly noted, is the test of commercial insolvency or cash flow insolvency in that the company must be able to pay its debts when they fall due and not at some future date. In other words, the company must be willing and able to meet the current demand of the creditor. In this way, a company cannot be said to be solvent when it asserts that it is able to pay the debt but persists in not doing so.

[21] Now, the learned judge considered that the appellant had failed to show that it was solvent. The learned judge took the view that the two documents

presented were insufficient. Instead, the appellant ought to have produced its audited financial statements. The appellant, before us, criticised this approach and submitted that the two documents were provided as part of the appellant's statutory obligation under the CA 2016 and must be taken as the true and accurate reflection of the appellant's solvency. In short, the appellant was in effect contending that a winding up court should not go beyond the two documents in determining whether the presumption of insolvency has been rebutted.

[22] On this score, we do not think there is merit in the appellant's submission. In our view, any attempt to displace the presumption of insolvency must go beyond opinions of insolvency by auditors. We agree that rather than mere assertions of insolvency even by professionals, a company must produce the best evidence of its financial position in the form of audited statements and accounts. The appellant, even if it was an exempt private company, had an obligation under the law to maintain audited accounts.

[23] Having failed to produce its latest audited financial statements, as noted by the learned judge, we agreed with the finding that the appellant fell far short of establishing its solvency. Given the presumption of insolvency, the appellant ought to have taken seriously its duty and burden of displacing the presumption by putting all its card on the table and not hide merely behind opinions of the auditors through the two documents. In this context, we have also noted that the appellant failed to respond to six letters of demand, which we agree had weakened the probative force of the argument against insolvency as advanced by the appellant. In the upshot, this contention of solvency must fail.

THE RESULT

[24] In the circumstances, and for the reasons provided, we were not persuaded that the decision of the learned judge was plainly wrong. On the contrary, the learned judge had exercised his discretion correctly. The appeal was therefore dismissed with costs of RM10,000. The order of the High Court was affirmed. Deposit to be refunded.

Appeal dismissed with costs of RM10,000, decision of High Court affirmed.

Reported by Addibah Adnan